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No. 83-926

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AXEL-FELIX KLEIBOEMER, *et al.*,
Petitioners,

v.

THE DISTRICT OF COLUMBIA,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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REPLY BRIEF FOR PETITIONERS

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TABLE OF AUTHORITIES

	Page
Alfred A. Altimont v. *Chatelain, Samperton & Nolan*, 374 A.2d 284 (D.C. App. 1977)	7
Bishop v. *District of Columbia*, 401 A.2d 955 (D.C. App. 1979), 411 A.2d 977 (*en banc*), *cert. denied*, 446 U.S. 966 (1980)	1
Bob Jones University v. *Simon*, 416 U.S. 725 (1974)	5-6
Burch v. *Louisiana*, 441 U.S. 130 (1979)	4
California v. *Grace Brethren Church*, 457 U.S. 393 (1982)	6
Chardon v. *Soto*, 462 U.S. ——, 103 S. Ct. 2611 (1983)	7
Communist Party, U.S.A. v. *Catherwood*, 367 U.S. 389 (1961)	7
Delaware v. *Prouse*, 440 U.S. 648 (1979)	7
Dewey v. *Des Moines*, 173 U.S. 193 (1899)	5
Dodge v. *Osborn*, 240 U.S. 118 (1916)	5
Eddings v. *Oklahoma*, 455 U.S. 104 (1982)	5
Fair Assessment in Real Estate Association, Inc. v. *McNary*, 454 U.S. 100 (1981)	6
Franks v. *Delaware*, 438 U.S. 154 (1978)	4
Harlin v. *Missouri*, 439 U.S. 459 (1977)	4
Illinois v. *Gates*, 462 U.S. ——, 103 S. Ct. 2317 (1983)	4
Konigsberg v. *State Bar of California*, 353 U.S. 252 (1957)	5
Mennonite Board of Missions v. *Adams*, 462 U.S. ——, 103 S. Ct. 2706 (1983)	6
Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)	6
New York ex rel. Bryant v. *Zimmerman*, 278 U.S. 63 (1928)	4
Ocala Star-Banner Co. v. *Damron*, 401 U.S. 295 (1971)	4
Oregon v. *Hass*, 420 U.S. 714 (1975)	7
Oregon v. *Kennedy*, 456 U.S. 667 (1982)	7
Orr v. *Orr*, 440 U.S. 268 (1979)	4
Payton v. *New York*, 445 U.S. 573 (1980)	4
Pruneyard Shopping Center v. *Robins*, 447 U.S. 74 (1980)	4

TABLE OF AUTHORITIES—Continued

	Page
Rogers v. *Hennepin County*, 240 U.S. 184 (1916)	4
Staub v. *City of Baxley*, 355 U.S. 313 (1958)	5
Wood v. *Georgia*, 450 U.S. 261 (1981)	5
Zacchini v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)	7

OTHER AUTHORITY

R. Stern and E. Gressman, *Supreme Court Practice* (1978)	4

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REPLY BRIEF FOR PETITIONERS

I.

Respondent, District of Columbia, does not challenge the intellectual validity of petitioners' argument that it is a denial of due process of law to refuse to refund $1.8 million dollars of unlawfully collected taxes to 2,711 nonresident class members who have obtained a favorable class action judgment.[1] Rather, respondent seeks to

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[1] The District of Columbia Court of Appeals concluded in the first round of appeals that class members do have a statutory vested right, granted by Congress under the Home Rule Act, to be immune from a commuter tax and that this right was abridged by the tax in question. *Bishop* v. *District of Columbia*, 401 A.2d 955 (D.C. App. 1979), 411 A.2d 997 (*en banc*), *cert. denied*, 446 U.S. 966 (1980). Thus, the existence of such a vested right is not in dispute here.

avoid the substance of petitioners' due process claims by incorrectly arguing that the issues are not properly before this Court.

The District errs in asserting that the due process claims were not raised below. Petitioners raised the due process arguments during the course of the trial court's hearing held on the question of whether the District was required to refund all of the tax money. Class counsel (Mr. McDonald) stated:

> We submit then, Your Honor, that at that point, where the District had a ruling, that the tax was [lawful], they clearly—it was to their advantage to accept the class as certified by Judge Penn because when it was ruled [lawful], they wanted to bind everybody. Thereafter, when we appealed, and the District did not appeal, if they wanted to challenge the certification or the nature and extent of the certification, they should have filed notice of appeal. They cannot now come back three years, over—three years later and seek to relitigate that issue, which should have been raised at the time of Judge Penn's class certification. *I submit to you that the very fundamental law governing class action judgments is that they are binding on all parties, regardless of the outcome.* That is the very purpose. It is binding for, against the Plaintiffs. It is binding for the Plaintiffs. It is binding for the District and binding against the District. It would, indeed, be a novel proposition of law if the District were to successfully urge now that, after having been certified, having been bound by the judgment, and entitled to the benefits, that by some arguable theory, they can now redefine the class, so as to eliminate certain people from the class who are originally certified in the class.

Transcript of Hearing of December 18, 1980 at 18-19. (Emphasis supplied.)

Petitioners also clearly raised and briefed the constitutional arguments in the court of appeals. Argument II of Appellants' Brief states that:

> Due process and fundamental fairness demand that all class members, having been bound by the judgment against them, have the benefit of this Court's reversal of that judgment and decision that the tax is unlawful.

Appellants' Brief at 26-28. Respondent never suggested that the due process and fundamental fairness issues were not properly before the court of appeals. Appellee's Brief at 21-23.

The Petition for Rehearing or Rehearing En Banc also clearly raised the constitutional claims. Petitioners argued:

> [I]t would be a denial of constitutional due process of law for the District of Columbia to deny refunds to members of a properly certified class (including all nonresidents who have paid the tax whether or not they have filed individual claims for refund) where such class members ultimately obtain an en banc judgment of this Court that the tax challenged in the class action is in fact unlawful and where all class members did not receive actual individual notice of the requirement for administrative claims. . . . The District cannot constitutionally refuse to refund all such monies or refuse to pay interest as provided by law when this Court ultimately reversed the trial court's judgment against the members of the class as originally defined in the class certification order.

Petition for Rehearing at 4-5.

The court of appeals quite plainly rejected petitioners' claims on the merits and held that allowing respondent to retain $1.8 million of the illegally collected taxes would

not be extremely harsh or fundamentally unfair. Pet. App. at 20a.[2]

Due process claims may properly be raised here when the claims were brought to the attention of the court of appeals "with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928), cited in *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 85, n.9 (1980). In *Zimmerman* this Court concluded that it had jurisdiction over all three issues where petitioner alleged in general terms that the state statute was unconstitutional. *Id.* 278 U.S. at 65, 69. *Zimmerman* makes clear that "[n]o particular form of words or phrases is essential" to raise a constitutional claim and that the "fair precision" requirement is a standard which is easily met.

This Court has "never suggested that the jurisdictional stipulations of § 1257 require that all arguments on behalf of . . . a federal claim be raised and decided below." *Illinois* v. *Gates*, 462 U.S. ——, 103 S. Ct. 2317, 2337 (1983) (White, J., concurring). *See* R. Stern and E. Gressman, *Supreme Court Practice*, 230 (1978). "Parties are not confined here to the same arguments which were advanced in the courts below upon a federal question

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[2] For the purposes of this Court's review, it is not necessary to inquire if a federal question was raised in a court below where it appears that such question was actually considered and decided. *Orr* v. *Orr*, 440 U.S. 268, 274-275 (1979); *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295, 299 n.13 (1971). A ruling on the merits of a federal question by the highest state court leaves the federal question open to review in this Court. *Payton* v. *New York*, 445 U.S. 573, 582 n.19 (1980); *Burch* v. *Louisiana*, 441 U.S. 130, 133 n.5 (1979); *Harlin* v. *Missouri*, 439 U.S. 459 (1977); *Franks* v. *Delaware*, 438 U.S. 154, 161-162 (1978); *Rogers* v. *Hennepin County*, 240 U.S. 184, 188-189 (1916).

there discussed." *Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1899). The jurisdiction of this Court "does not depend on citation to book and verse." *Eddings* v. *Oklahoma*, 455 U.S. 104, 113-114 n.9 (1982); *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 255-258 (1957). Thus, under well-settled principles of law, this Court has jurisdiction to review any constitutional claims raising due process or fundamental fairness issues where the court of appeals clearly decided petitioners' due process and fundamental fairness claims.[3]

II.

A.

Respondents incorrectly rely on case law which requires exhaustion of administrative remedies[4] (Brief in Op. at 8-9, n. 7). This case law is inapplicable to petitioners' constitutional arguments where, as here, a class is properly certified and where the class has obtained a judgment holding the tax *ultra vires* and unlawful. (Pet. at 9-15). *See Staub* v. *City of Baxley*, 355 U.S. 313, 319 (1958) (failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of conviction under such ordinance.)

Moreover, respondent's authorities are distinguishable on their facts. *Dodge* v. *Osborn*, 240 U.S. 118, 122 (1916), holds that a U.S. District Court has no jurisdiction to enjoin the collection of the income tax where the taxpayer never paid the tax or filed an appeal to the Commissioner of Internal Revenue. *Bob Jones Univer-*

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[3] This Court also has jurisdiction under the "plain error" rule. *E.g.*, *Wood* v. *Georgia*, 450 U.S. 261, 265 n.5 (1981).

[4] Respondent's authority is inapposite where, as here, the tax has been declared illegal and where the class representative did exhaust administrative remedies prior to filing the class action and did so again during the litigation by filing a class claim for refund. (Pet. App. 31a-32a.)

sity v. *Simon*, 416 U.S. 725, 748-750 (1974), holds that the Anti-Injunction Act, 26 U.S.C. § 7421(a), forbids the issuance of injunctive relief to bar the Internal Revenue Service from withdrawing petitioner's tax-exempt status. *California* v. *Grace Brethren Church*, 457 U.S. 393, 407-413 (1982), holds that the Tax Injunction Act, 28 U.S.C. § 1341, deprives the U.S. District Court of jurisdiction over a suit seeking to enjoin the State of California from collecting unemployment tax from certain schools. *Fair Assessment in Real Estate Association, Inc.* v. *McNary*, 454 U.S. 100, 116 (1981), holds that principles of federalism and comity bar a taxpayer from maintaining an action in U.S. District Court for damages under 42 U.S.C. § 1983 to redress an allegedly unconstitutional administration of a state tax system.

B.

The District concedes that many class members did not receive actual notice that the District would seek to require taxpayers to file individual claims for refunds, even though a class action had been certified. Where, as here, the names and addresses were "reasonably ascertainable," due process requires actual notice.[6] *Mennonite Board of Missions* v. *Adams*, 462 U.S. ——, 103 S. Ct. 2706, 2712 (1983); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

III.

A fair reading of the opinion below demonstrates that the court of appeals rested its decision as regards equitable tolling on federal law. With one exception, the cases cited by the court of appeals are decisions of this Court.

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[6] Respondent had in its files the names and addresses of those individuals who did not receive the December 1978 mailing, since each of these individuals had filed a return for tax year 1975 and/or 1976, even if these names and addresses were not formally collected in a "list."

The fact that the court of appeals, without resting its decision on the local law, finds it necessary to distinguish cases decided by this Court reveals the federal basis of the court's decision so as to confer jurisdiction on this Court.[6] *Oregon* v. *Hass*, 420 U.S. 714, 719-720 (1975). *See also Oregon* v. *Kennedy*, 456 U.S. 667, 671 (1982). This Court has recognized the undesirability of having conflicting state and federal interpretations of federal law. *Communist Party, U.S.A.* v. *Catherwood*, 367 U.S. 389, 394 (1961). Because the court of appeals felt compelled by this Court's decision to decide the equitable tolling doctrine the way it did, this Court should grant the writ.[7] *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977).

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[6] Superior Court Rule 23 is identical to Rule 23 of the Federal Rules of Civil Procedure. Federal cases are authority where D.C. rules are identical to federal rules. *Alfred A. Altimont, Inc.* v. *Chatelain, Samperton & Nolan*, 374 A.2d 284, 288 n.4 (D.C. App. 1977).

[7] *Chardon* v. *Soto*, 462 U.S. ——, 103 S. Ct. 2611, 2614-2615 (1983), is distinguishable on its face because the issue of tolling of statute of limitations was decided as a matter of Puerto Rican, not federal, law.

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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